Eliason Corporation *and* Sheet Metal Workers' International Association, Local No. 355, AFL-CIO. Case 20-CA-15937

26 April 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 6 July 1981 the National Labor Relations Board issued its initial Decision and Order[1] in this proceeding in which it found that the Union was properly certified on 17 December 1980 following a valid Board-conducted election and that the Respondent Eliason Corporation had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with it as the collective-bargaining representative of the Respondent's employees. Accordingly, the Board ordered the Respondent to bargain with the Union.

On 7 September 1982 the United States Court of Appeals for the Sixth Circuit denied enforcement[2] of the Board's Order and remanded the proceeding to the Board for the purpose of conducting a hearing on the Respondent's allegation of union misconduct prior to the election. The Board accepted the remand and, in accordance therewith, a hearing was held before Administrative Law Judge Gerald A. Wacknov.

On 9 September 1983 Judge Wacknov issued the attached decision. The Respondent and the Union have filed exceptions, with supporting briefs, to the judge's decision.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[3] and has decided to affirm the judge's rulings, findings,[4] conclusions, and recommendations.[5] Accordingly, we shall affirm our initial Decision and Order in its entirety.

ORDER

The National Labor Relations Board affirms its original Decision and Order (256 NLRB 1121 (1981)).

[1] 256 NLRB 1121.

[2] 688 F.2d 22.

[3] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[4] In agreeing with Judge Wacknov that certain remarks made by union observer Roy Hutton to employee Montenegro prior to the election did not constitute objectionable conduct sufficient to set aside the election, we do not rely on his statement that Montenegro did not feel threatened by Hutton's remarks since it is well established that the subjective reactions of employees are irrelevant to the question of whether objectionable conduct occurred. See *Beaird-Poulan Division*, 247 NLRB 1365, 1370 (1980). Furthermore, in view of their agreement with the judge's finding that "the record does not show that the threats . . . were in any respect related to the union activity or lack thereof of the Spanish surnamed employees or to the union activity of Hutton," Members Zimmerman and Dennis find it unnecessary to determine if Hutton was an agent for the Union. Member Hunter would find Hutton not to be an agent for the Union for the reasons stated by Judge Wacknov in his decision.

[5] In his decision Judge Wacknov suggests that "due to the paucity of evidence proffered by the Respondent" in support of its objection to the election, the Board should give consideration to the Union's request for litigation expenses. The Union, while agreeing with the judge's observations, nevertheless excepts to his failure to expressly recommend that such expenses be awarded and has, again, in its brief requested that such an award be made. The Union's request for litigation expenses is denied. An award of litigation and other expenses is appropriate only when a respondent raises patently frivolous defenses. *Tiidee Products*, 194 NLRB 1234 (1972). Here, the Respondent's claim that Hutton's remarks interfered with the conduct of the election was found by the Sixth Circuit to have raised a substantial issue warranting a hearing. Thus, while the Respondent may have failed to produce sufficient evidence to support its claim, it cannot be said, in light of the court's decision, that the Respondent's claim was patently frivolous.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to an order directing hearing issued by the Board on January 12, 1983, a hearing with respect to this matter was held before me in San Francisco, California, on June 23, 1983.

The instant hearing was directed as a result of the remand of the case to the Board[1] by the United States Court of Appeals for the Sixth Circuit,[2] for the purpose of holding an evidentiary hearing on Respondent's objections to the election in the underlying representation case (Case 20-RC-14957).

The election objections involved herein concern Respondent's contention that prior to the election conducted in Case 20-RC-14957 on June 12, 1980, the Union's observer, Roy Hutton, threatened employees with bodily harm, and that such misconduct affected the outcome of the election. The Board, relying on the Regional Director's Report on Objections issued on July 18, 1980, issued a Decision and Certification of Representative on December 17, 1980. Subsequently, as noted above, the United States Court of Appeals for the Sixth Circuit determined that an evidentiary hearing on Respondent's objections was warranted and remanded the case to the Board for that purpose.

The Board's order directing hearing specifies that the instant hearing shall be for the sole purpose of determining whether Hutton's alleged misconduct affected the outcome of the election.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and

[1] The Board's initial Decision and Order granting the General Counsel's Motion for Summary Judgment is reported at 256 NLRB 1121 (1981).

[2] *Eliason Corp. v. NLRB*, Docket No. 81-1463 (6th Cir. 1982).

to introduce relevant evidence. The General Counsel and the Union stated their respective positions and arguments at the hearing, and Respondent has filed a posthearing brief.

On the entire record, and consideration of the arguments of counsel and the brief submitted, I make the following

FINDINGS OF FACT

Respondent presented evidence establishing its attempt but failure to locate a critical witness to this proceeding, namely, Gabriel Montenegro, an employee to whom Roy Hutton directed certain threats against other employees. Thereupon, pursuant to Rule 804 of the Federal Rules of Evidence providing for the admissibility of hearsay evidence in the event of the unavailability of a witness, I admitted into evidence Montenegro's affidavit, given to a Board agent on July 1, 1980.

Montenegro's affidavit, in pertinent part, states as follows:

> On or about June 10, 1980 myself along with two neighbors were standing in front of our apartment complex. Roy Hutton and Steve Bradley walked up. They were going to visit another man who lived in the apartment complex. Hutton had been fired from Eliason Corp. the same day and seemed that he was angry. Hutton stated "I'm going to kick some mexican asses and I going to start with Louie. [Louis Madrigal] I'm going to kill him." Hutton repeated the threat 3–4 times and then left to visit Hank———. Hutton and Bradley returned about 30 minutes later and repeated the threat again. At this point I told him he should tell Louie to his face and not me. Bradley didn't say anything and they left.
>
> I told Louis Madrigal and another employee Etilano Olmos about the above incident on June 11, 1980 at work. I didn't tell any one else about the incident.
>
> On the day of the election there were six mexicans on lay off and none of us knew they could vote until a day or two after the lay off. We learned from the front office that the six employees could have voted.
>
> On the day of the election Roy Hutton acted as the union observer. He didn't say anything to me when I voted and to the best of knowledge didn't say anything to Madrigal or anyone else.

Respondent called Gilbert Corvello, business manager and financial secretary of the Union, as a witness, for the apparent purpose of attempting to establish that employee Hutton was an agent of the Union. Corvello testified that Hutton was a union proponent although he was not a member of the Union. Corvello would on occasion speak to Hutton, as well as to other interested employees who were also proponents of the Union, regarding the support among the employees toward the Union. Corvello's testimony establishes that his relationship with Hutton was a casual one, and was not different from his relationship with other employees who favored the Union.

Corvello testified that subsequent to the election, apparently as a result of the Employer's election objections, he learned of the alleged threats by Hutton. He thereupon phoned Hutton and inquired about it. Hutton, according to Corvello, denied that he made any such threat.

Regarding the fact that Hutton acted as the Union's election observer, Corvello testified that on the day of the election he was present at a preelection meeting at the Employer's premises. Hutton, who had been discharged several days before, appeared at the Employer's premises and asked the Board agent whether he was eligible to vote. Corvello had not requested Hutton's presence, and intended not to have an observer during the election. However, since Hutton was present, Corvello thereupon asked the Board agent if Hutton could act as the Union's observer. According to Corvello's testimony, the Board agent then asked Respondent's attorney, Lee Boothby, whether Respondent objected to this request. Boothby initially voiced an objection based on the fact that Hutton had been terminated and was no longer an employee, but then withdrew this objection. Thereupon, Hutton became the Union's election observer. Corvello's testimony stands unrebutted in the record.

The record contains a representation by Respondent's attorney that an attempt was made to locate two former employees, namely, Danny Flores and Tony Gomez, who purportedly had evidence supporting the Employer's objections. However, the details of such attempts to find the individuals were not specified on the record. Further, Respondent's attorney represented on the record that more important than its attempt to locate the aforementioned employees was Respondent's reluctance to call them as witnesses without first examining the affidavits which, Respondent believed, they had given to the Board during the course of the investigation. Upon being advised that no such affidavits existed, Respondent made no effort to obtain their testimony.

Further, the record shows that Louis Madrigal, the individual who, according to Montengro's affidavit, was specifically threatened by Hutton, was readily available as a witness. However, when Respondent's attorney learned there was no affidavit from Madrigal, it elected not to call him. Similarly, Respondent elected not to call Hutton, who was also available.

Conclusions and Recommendations

The burden of proving that an election should be invalidated because of objectionable conduct rests with the party filing the objections, in this case, Respondent. *NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961); *Campbell Products Department*, 260 NLRB 1247, 1249 (1982).

In *Price Bro. Co.*, 211 NLRB 822, 823 (1974), the Board reiterated the well-established principle that:

> . . . the standard to be applied in determining whether an election will be set aside on the basis of conduct not attributable to one of the parties is whether the character of the conduct was so aggravated as to create a general atmosphere of fear and

reprisal rendering a free expression of choice of representatives impossible.[1]

[1] *Central Photocolor Company, Incorporated*, 195 NLRB 839, and cases cited therein at fn. 2.

Reliable record evidence shows, and I find, that Roy Hutton, who had recently been discharged by the Employer, told employee Montenegro that he intended to "kick some mexican asses" and to "kill" another Spanish-surnamed individual, Madrigal, all employees of Respondent. There is no record evidence that Montenegro felt threatened by Hutton's remarks. Nor does the record reveal a probable reason for such threats. More importantly, the record does not show that the threats, which Hutton repeated to Montenegro, were in any respect related to the union activity or lack thereof of the Spanish-surnamed employees or to the union activity of Hutton.

Regarding Respondent's contention that Hutton was an agent of the Union, the record does not demonstrate that Hutton's conduct was either motivated or condoned by the Union, or that Hutton's status vis-a-vis the Union was different from other rank-and-file employees who favored the Union. Clearly, contrary to Respondent's position, the record evidence does not establish that Hutton was an agent of the Union. *Owens-Corning Fiberglas Corp.*, 179 NLRB 219, 223 (1969), affd. 435 F.2d 960 (4th Cir. 1970); *Tennessee Plastics*, 215 NLRB 315, 319 (1947), enfd. 525 F.2d 670 (6th Cir. 1975); *Cambridge Wire Cloth Co.*, 256 NLRB 1135 (1981).

The fact that certain Spanish-surnamed employees may not have voted in the election may not, based on the record evidence, be reasonably attributed to Hutton's threats.[3] First, Montenegro's affidavit states that "on the day of the election there were six mexicans on layoff, and none of us knew they could vote." Thus, it is reasonable to assume, absent any evidence to the contrary, that these individuals refrained from voting either because they were unaware of their eligibility or because, as they were not working at the time of the election, they had little interest in its outcome. Secondly, the record shows that Hutton's participation as an observer during the election was by chance, and with approval of Respondent, and there is no showing that the employees who refrained from voting were even aware that Hutton, who had been discharged several days before, was on the premises.

On the basis of the foregoing, I find that the Employer has failed to sustain its burden. Thus, the evidence does not substantiate Respondent's contention that the election should be invalidated due to Hutton's threats, which did not, insofar as the record shows, create a general atmosphere of fear and reprisal rendering a free expression of choice of representative impossible. *Price Bros. Co.*, supra; *ARA Services*, 263 NLRB 88 (1982).

Respondent maintains that, regardless of the merits of its objections, because of the passage of time and the depletion of the bargaining unit it would be appropriate to conduct a second election rather than require it to bargain. The Charging Party asserts that not only is a bargaining order mandated, but Respondent's appeals and delay of the matter have not been undertaken in good faith, and are frivolous, as demonstrated by Respondent's failure to even proffer any evidence regarding its objections, other than what is contained in the Regional Director's Report on Objections. Therefore, the Charging Party requests that it be reimbursed by Respondent for its litigation expenses and other costs. As the Board's order has specifically limited my authority in this matter, it appears that these collateral contentions are not properly before me, and should properly be referred to the Board. However, due to the paucity of evidence proffered by Respondent, which relates to whether its objections were advanced in good faith, it would appear that the Charging Party's request for reimbursement of litigation expenses, under the circumstances, is certainly deserving of serious consideration.

On the foregoing findings of fact and conclusions of law and on the entire record, it is recommended[4] that the Board enter an order against Respondent containing the same cease-and-desist provisions and affirmative remedial action as are contained in the Order of the Board herein reported at 256 NLRB 1121 (1981).

[3] The tally of ballots shows that of approximately 17 eligible voters, 6 cast ballots for and 3 cast ballots against the Union. There was one challenged ballot, apparently that of Hutton. Thus, of the seven eligible voters who refrained from voting, six were apparently on layoff.

[4] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.